Office-Supreme Court, U.S.
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No. ~~856~~ 38

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

CITY OF EL PASO, - - - - - - Appellant,

versus

GREENBERRY SIMMONS, - - - - - Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS [AND/OR] AFFIRM.

HAROLD S. LONG,
El Paso National Bank Bldg.,
El Paso 1, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Building,
Louisville, Kentucky,
Counsel for Appellee.

March 10, 1964.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 866

CITY OF EL PASO, - - - - - *Appellant,*

v.

GREENBERRY SIMMONS, - - - - - *Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS [AND/OR] AFFIRM.

Appellee, pursuant to Rule 16 (1) of this Court, moves to dismiss [and/or] that the judgment and decree of the Court of Appeals for the Fifth Circuit be Affirmed and Modified by changing "Reversed and Remanded" to "Reversed and Judgment for Appellant Simmons" (Appellee here), on the ground that the question presented is so unsubstantial as not to need further argument.

STATEMENT.

This is an appeal from a judgment and decree entered on September 26, 1963 by the Court of Appeals for the Fifth Circuit, reversing, giving judgment to Simmons and remanding to the United States District

Court for the Western District of Texas, El Paso Division, stating the District Court had not considered the City's defenses of adverse possession and laches.

The District Court had sustained the City's Motion for Summary Judgment and denied Simmons' Motion for Summary Judgment and dismissed the suit. The District Court filed no written Opinion. There is nothing in the Printed Record which counsel for Simmons can find, to show that District Court did not consider the City's defenses of adverse possession and laches.

The primary question decided by the Court of Appeals, in its decision below, was that Simmons' contract obligations were impaired by the legislative acts, in violation of the rights given Simmons under the Contract Clause and Due Process Clause of the Constitution of the United States.

The Court further decided that Simmons was the equitable and record owner of the lands, and had a contractual right to have the legal title delivered to him, and under these conditions the resale of the same lands to the City, without any compensation and without notice to Simmons, was illegal, void and unconstitutional insofar as it violated the rights given Simmons under the Contract Clause and Due Process Clause. *Simmons* v. *City of El Paso*, 320 F. 2d 541, 544.

However, the Court of Appeals remanded the suit to give the City the opportunity of presenting its defenses of adverse possession and laches.

In order for the City to prove its defenses under adverse possession, it must have a deed or deeds duly registered,[1] and the only "deed or deeds duly registered" it has is this illegal, void and unconstitutional sale to use as a basis for its adverse possession claim.

ARGUMENT.

An unconstitutional sale cannot be later used as a required basis, for a defense, between the same parties, in the same suit.

> "An unconstitutional law is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County*, 118 U. S. 425, 442, 6 S. Ct. 1121, 30 L. Ed. 178.

The City has acted under an unconstitutional act, and here, "it affords no protection" to the City, either at a later date or here and now. It is of no effect.

It is the contention of Simmons that it is useless to have to go back to the District Court and then come all the way to the Supreme Court again, when all the City has for its required deed or deeds duly registered is the one unconstitutional instrument, upon which to base its adverse possession claim.

Regardless of this Statute, Art. 5509, Appendix A, may be construed and applied, this unconstitutional sale cannot be used as a basis, for a defense, in the same suit between the same parties. If it is permitted to

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[1]Vol. 16 Vernon's Ann. Civ. St. Tex. Art. 5509, p.363. Appendix A., p. 9.

be used, then the adverse possession Statute, Art. 5509, as so construed and applied violates the rights given Simmons under the Due Process and Contract Clause. Cf. *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 74 A.L.R. 701. Cited by the Court of Appeals in its Opinion at p. 545.

If it is for the best interest of both parties to modify the judgment and end protracted litigation, the court will usually do so. *Patterson* v. *Mobile Gas Co.,* 271 U. S. 131, 46 S. Ct. 445, 70 L. Ed. 870. 5 Am. Jur. 2d Appeal and Error, § 937.

The judgment may then be affirmed as modified in cases tried in equity and without a jury. Cf. *Santa Fe County* v. *New Mexico,* 215 U. S. 296, 30 S. Ct. 111, 54 L. Ed. 202.

On October 30, 1963 Simmons complied with the Court of Appeals Opinion in tendering again all the interest and also, all the principal due under these contracts to the General Land Commissioner[1] for the State of Texas.

The two Supreme Court cases relied on by the City are inapplicable here, because they refer to the forfeiture part of the statute, whereas, here we have a reinstatement of lands which were already forfeited. When those early cases were decided there was no provision for forfeiture in the statute and therefore it was not a specific part of the contract. On the other hand, there has always been and is still a specific provision in the statute, which in this suit is part of the con-

[1]Certified copies of records of the General Land Office for the State of Texas. Appendix B, C of this motion, pp. 10-16.

tract, and consequently a specific provision in the contract, concerning reinstatement of lands which are already forfeited, "provided, that no rights of third parties may have intervened".[1] This meant where the State had not resold the land to another before reinstatement was applied for by the present equitable owner, who had been holding vested rights and paying on them for several years, and in this suit for over thirty years.

Simmons in District Court, filed a printed brief on his Motion for Summary Judgment. That same printed brief was filed in the Court of Appeals with additions of, Brief of Argument, Rider Sheet and record page numbers added and is filed here, as Simmons' Appendix D, to this motion. Forty copies of Simmons' Appendix D are filed here, but because of its length are separated from this motion.

Further details of the Constitutional question, herein involved, may be found in Point IV of Simmons' Appendix D, pp. 43-52. Brief and Summary of Argument, pp. 16g-16i and due process, p. 46. However, the Opinion of the Court of Appeals seems to well cover the Constitutional questions involved here. *Simmons v. City of El Paso*, 320 F. 2d 541.

The equities of Simmons are substantiated entirely by certified copies of records and documents as recorded in the Land Office and the County Clerk's Office,

[1]Appendix D, p. 56, reinstatement of land already forfeited statute, Texas Acts 1897, Ch. 129 pp. 184-185, which was also cited in the "OBLIGATION" part of both contracts, printed Record, pp. 43, 67.

covering over 85 pages of the Printed Record.[1] The equitable title obtained by settlers in 1910, who built their homes on these homesites and had to live on them for the required three years,[2] obtained vested rights in these contracts which have been well settled by Texas cases for over half a century,[3] and confirmed by the Court of Appeals' opinion here. These settlers were the predecessors in title of Simmons.

The City has no title to these lands. It cannot and has not shown that record owner Simmons had actual notice of the City's claim to these lands, and the claim of laches, in Texas is determined by the period of the adverse possession statute, there can be no guilt of laches on the part of Simmons. *Murphy* v. *Welder*, 58 Tex. 235 (Tex. S. Ct. 1883, before S. W. Reporter). For list of supporting cases, 2 Tex. Jur. 2d Adverse Possession § 217.

Looking through form to substance, as a Court of Equity may do in this suit, the summarily sustaining of this motion to affirm with modification, will relieve and assist this Honorable Court from having to hear a useless and unnecessary oral argument.

We respectfully suggest, that the affirmance with modification in many other similar suits, may be seriously considered in the future as more usable procedure to cope with the increasing volume of suits, and assist-

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[1]Nine extra copies of the Printed Record have been filed in the Clerk's Office and made available. R., pp. 36-125. A summary of equities and statement is in Brief of Argument, pp. 16b-16d of Appendix D.

[2]R., pp. 46, 48, 69.

[3]Appendix D, pp. 16h, 16f, 30, 33.

ing all parties by helping to eliminate multiplicity of arguments and unnecessary retrials."

With the entire Record and Simmons' appendices available, and the City having had its day in court, this seems to be all that will ever be substantially presented in this suit, no matter how many times it comes before a court, and we earnestly believe it is now in condition for summary affirmance with modification.

We respectfully submit, therefore, that Simmons has for 2½ years been showing that the City has no interest in this land and that a further long inequitable delay can be averted, and that the administration of justice may prevail for both the Appellant and the Appellee by the modification of the judgment and decree in the Court of Appeals, by changing "Reversed and Remanded" to "Reversed and Judgment for Appellant Simmons" (Appellee Simmons here) and that the judgment and decree as thus modified, should be affirmed.

HAROLD S. LONG,
El Paso National Bank Bldg.,
El Paso 1, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Bldg.,
Louisville, Kentucky,
Counsel for Appellee.

March 10, 1964.

PROOF OF SERVICE.

I, Greenberry Simmons, one of the Attorneys for Greenberry Simmons, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby Certify that on the 12th day of March 1964, I served copies of the foregoing Motion to Dismiss [and or] Affirm, on the Appellant, City of El Paso, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the respective Attorneys of record as follows:

To Thornton Hardie, Esq.
To William J. Mounce, Esq.
Attorneys for Appellant, City of El Paso,
El Paso Natural Gas Company Bldg.,
El Paso, Texas.

Signed: Greenberry Simmons,
Attorney for Greenberry Simmons,
Kentucky Home Life Bldg.,
Louisville, Kentucky.

APPENDIX A.

The Adverse Possession Defense of City (Appellant Here), Requires a "Deed or Deeds Duly Registered" as a Basis for Its Defense. It has None Except Its Unconstitutional Sale Obtained from the State Which Created This Municipal Corporation. This is the Texas Statute Involved.

Vol. 16 Vernon's Ann. Civ. St. Tex. Art. 5509, p. 363; Texas Acts 1897 p. 132; G. L. Vol. 8, p. 1432.

Art. 5509 [5674] [3342] [3193] Five years' possession

Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claming under a *deed or deeds duly registered*,[1] shall be instituted within five years next after cause of action shall have accrued, and not afterward. This article shall not apply to one in possession of land, who deraigns title through a forged deed. And no one claiming under a forged deed, or deed executed under a forged power of attorney shall be allowed the benefits of this article. Id., Acts 1879, p. 132; G. L. vol. 8, p. 1432.

[1]Emphasis added.

APPENDIX B.

Simmons' Compliance with the Court of Appeals Opinion at p. 545.

"The tender made by the Appellant, assuming it has been or will be kept good, reinstated the contract." *Simmons* v. *City of El Paso*, 320 F. 2d 541, 545.

Certified Copy of the Records of the Texas General Land Office, Made By the General Land Commissioner, of a Letter Dated October 26, 1963, from Greenberry Simmons, Appellee, Tendering again all Interest and all Principal Due on These Contracts. It is Stamped "Received October 30, 1963, General Land Office."

GREENBERRY SIMMONS
Attorney at Law
Kentucky Home Life Building
Louisville 2, Kentucky

October 26, 1963

Mr. Jerry Sadler, Commissioner
General Land Office for the State of Texas
Austin 14, Texas

Dear Mr. Sadler:

Re: N/2 Survey 240, N. D. Mundy, El Paso County,
File No. 147016 and other file numbers.
Survey 235, Laura E. Mundy, El Paso County,
File No. 112121 and other file numbers.

In order to comply with the Court's opinion and the Land Purchase Contracts of 1910 involved and the latter is already filed in the Land Office, enclosed are the following pertaining to the above specified parcels of land:

1. Certified Copy of the Judgment in Greenberry Simmons v. City of El Paso entered September 28, 1963 by the U. S. Court of Appeals for the Fifth Circuit.

2. Letter dated Sept. 28, 1963 from the Clerk of that court pertaining to this Certified Judgment.

3. Copy of the opinion of the Court is reported in 320 F. 2d 541.

4. Certified Copies of Deeds recorded in the County Clerk's office of El Paso County, Texas:

A. D. H. Heineman, heir of D. G. Heineman, grantor to Greenberry Simmons, grantee. Recorded 7/14/52.

B. Affidavit of Heirship of D. H. Heineman, Recorded 7/14/52.

C. Tella H. Heineman, grantor to Greenberry Simmons grantee, Recorded 7/14/52.

D. Affidavit of Heirship of Tella H. Heineman, Recorded 7/ 14/52.

5. Two applications of Greenberry Simmons to reinstate the forfeited lands and two duplicated checks (not to be cashed) for all back interest, as was tendered in 1952.

Please file all the above instruments and charge the filing fees to my Account No. 742.

6. Current checks for all principal and all interest due on N/2 Survey 240 N. D. Mundy, El Paso County as follows:

A. All Principal	$492.98
B. All back interest to July 23, 1952	430.11
C. All back interest from July 23, 1952 to date	171.62

7. Current Checks for all principal and all interest due on Survey 235 Laura E. Mundy as follows:

A. All Principal	$438.00
B. All Interest to July 23, 1952	251.02
C. All Interest from July 23, 1952 to date	148.92

We believe that the above checks pay all amounts due in full under the Land Purchasing Contracts of 1910 and

the court's opinion. However we are tendering a further check to pay any other sums which you believe are due under the contracts and court's opinion and the balance left over to be added to my charge account #742, in the Land Office. This tendered check is for one thousand dollars.

The total of all seven checks tendered is twenty nine hundred thirty two dollars and sixty five cents. This should be much more than the total amount due.

It may be surprising to realize, the fact that my predecessors in title and I have paid the State, over three times the $1.50 contracted purchase price for these lands. In addition Settlers Glenn and Kilpatrick lived 3 years on these homesite lands to acquire the vested rights in these 3 year Residential Occupational Certificates. These were recorded in 1913 in the Land Office and the County Clerk's Office, as our Muniments of Title. Acts May 16, 1907 pp. 495-496.

I received a letter from the Acting Commissioner of the Land Office on September 6, 1952 with reference to the D. G. Heineman properties, saying "after patent is issued, all title inures to the benefit of the legal owners • • • ". Is this position still maintained by the Land Office?

If you have other suggestions I will be glad to hear from you or if you think best call me collect, Louisville, Ky., Area Code No. 502, Tel. 451-4314 or 583-8905.

Sincerely yours,

Reply to this address:

(s) Greenberry Simmons,
1484 Cherokee Road,
Louisville, Kentucky.

Encs. 17

Page one has the following notations:

CK 438.00 16103
CK 430.11 16104
CK 171.62 16105
CK 492.98 16106
CK 251.02 16107
CK 148.92 16108
CK 1,000.00 16109

RECEIVED
OCT 30 1963
GENERAL LAND OFFICE

Page two has the following notations:
Nos. 16103, 16104, 16105, 16106, 16107, 16108, 16109.

GENERAL LAND OFFICE, AUSTIN, TEXAS,
November 21, 1963

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse hereof is a true and correct copy of the original of this instrument now on file in this office together with all endorsements thereon.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

Commissioner of the
General Land Office

Jerry Sadler
(Seal)

APPENDIX C.

Certified Copy of the Records in the Texas General Land Office of a Letter of Jerry Sadler, Commissioner, Acknowledging the Receipt of the Tender of Interest and Principal Tendered in Simmons' Letter of October 26, 1963. Such Tender Was Made Again by Simmons to Comply with the Court of Appeals Opinion. Simmons v. City of El Paso, 320 F. 2d 541, 545.

November 13, 1963

Mr. Greenberry Simmons
Attorney at Law
1484 Cherokee Road
Louisville, Kentucky,

Re: Files 147016 & 112121
El Paso County, Texas

Dear Mr. Simmons:

This will acknowledge receipt of your letter dated October 26, 1963, with enclosures pertaining to the above referenced matter.

We have examined your request as contained in your correspondence and find that such requested action is not appropriate at this time. We are therefore returning to you the following:

1. Certified Copy of the Judgment in Greenberry Simmons v. City of El Paso entered September 28, 1963 by the U. S. Court of Appeals for the Fifth Circuit.

2. Letter dated September 28, 1963 from the Clerk of that court pertaining to this Certified Judgment.

3. Copy of the opinion of the Court is reported in 320 F. 2d 541.

4. Certified Copies of Deeds recorded in the County Clerk's office of El Paso County, Texas.

A. D. H. Heineman, heir of D. G. Heineman, grantor to Greenberry Simmons, grantee. Recorded 7/14/52.

B. Affidavit of Heirship of D. H. Heineman. Recorded 7/14/52.

C. Tella H. Heineman grantor to Greenberry Simmons grantee. Recorded 7/14/52.

D. Affidavit of Heirship of Tella H. Heineman. Recorded 7/14/52.

5. Two applications of Greenberry Simmons to reinstate forfeited lands and two duplicated checks (marked not to be cashed).

6. Seven (7) original checks returned direct herewith as follows:

General Land Office Register No. 16103	$ 438.00
General Land Office Register No. 16104	430.11
General Land Office Register No. 16105	171.62
General Land Office Register No. 16106	492.98
General Land Office Register No. 16107	251.02
General Land Office Register No. 16108	148.92
General Land Office Register No. 16109	1,000.00

Yours very truly,

Jerry Sadler, Commissioner.

JS:ths
Enclosures

Register Nos. 16103, 16104, 16105, 16106, 16107, 16108, 16109

REGISTERED MAIL
RETURN RECEIPT
REQUESTED

GENERAL LAND OFFICE, AUSTIN, TEXAS,
November 21, 1963.

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse hereof is a true and correct copy of the original

of this instrument now on file in this office together with all endorsements thereon.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

Commissioner of the
General Land Office

Jerry Sadler

(Seal)

APPENDIX D.

Appellee Simmons' Appendix D, is Separated from This Motion in 40 Separate Copies, As It is Rather Large To Be Attached To This Motion.

The Constiutional questions may be found summarized at pages 16g-16i and also in Point IV, pages 43-52. Summary of Equities and Statement is in Brief of Argument, pp. 16b-16d. At page 16i Simmons asked that the District Court judgment be reversed and that Simmons' Motion for Summary Judgment be sustained and judgment for Simmons. Likewise in District Court on petition for Rehearing and Motion, he asked for setting aside of the judgment and judgment for Plaintiff Simmons. R. 138, 142.

It is the Brief previously printed for the District Court by Plaintiff Simmons and the same printed Brief used by Appellant Simmons in the Court of Appeals, with additions of Rider Sheet, Brief or Summary of Argument, and all record page numbers involved added.

The City has probably received more from this land than the money it has spent on it, exclusive of attorney fees, and except the purchase price, which it can get back from the State. Appendix D, p. 5(6).